

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEVIN SALISBURY,

Defendant.

Case No. 2:13-cr-00062-JCM-PAL

**REPORT OF FINDINGS AND
RECOMMENDATION**

(Mot. Mental Comp. - Dkt. #25)

Before the court is the Defendant's Motion for Hearing to Determine Mental Competency to Stand Trial (Dkt. #25). The motion is granted. The court has considered the moving and responsive papers, medical records, reports and testimony at hearings conducted on January 2, 2014, and February 6, 2014. For the reasons explained below, the court finds that Salisbury is competent to stand trial and able to assist his counsel.

BACKGROUND

Salisbury is charged in an Indictment (Dkt. #1) returned February 12, 2013, with assault on a federal officer in violation of 18 U.S.C. § 111(a). The indictment arises out of an incident which occurred on November 29, 2012, when Salisbury allegedly assaulted a United States Marshals Service detention officer by striking the victim's face with his arm. Salisbury made an initial appearance, received appointed counsel, and was arraigned on March 22, 2013. He was detained following a detention hearing, pled not guilty and trial was initially set for May 15, 2013. The parties stipulated to continue the pretrial motions, calendar call and trial date. Stipulation (Dkt. #13). Defense counsel represented the discovery in the case was voluminous and he needed additional time to review discovery and try to negotiate the case. *Id.* The district judge granted the stipulation and continued the trial date until August 19, 2013 in an Order (Dkt. #14) entered May 14, 2013.

1 On July 10, 2013, counsel for Salisbury filed a Motion for Psychiatric Evaluation to Determine
2 Mental Competency to Stand Trial (Dkt. #16). The motion related that defense counsel had also been
3 appointed to another case in which Salisbury is a defendant in this district, 2:12-cr-00010-GMN-CWH.
4 In that case, Salisbury is charged with possession of a firearm by a convicted felon. The Federal Public
5 Defender's office was initially appointed to represent him on that charge. However, after numerous
6 appearances and potential plea agreements, the Office of the Federal Public Defender was allowed to
7 withdraw as counsel, and on November 27, 2012, Mr. Miceli was appointed to represent Salisbury. Mr.
8 Miceli was also appointed to represent Salisbury in this case following his indictment on the charge of
9 assault on a federal officer.

10 The Motion for Psychiatric Examination represented that Mr. Miceli had visited Salisbury at the
11 Nevada Southern Detention Center ("NSDC") on numerous occasions to discuss the facts of his cases
12 and potential plea negotiations. In May 2013, counsel visited Salisbury at NSDC to potentially finalize
13 plea negotiations. Salisbury indicated that he wished to resolve his cases with the proposed plea
14 agreements. Mr. Miceli so advised government counsel who prepared written plea agreements.

15 Mr. Miceli returned to NSDC to discuss the plea negotiations, and written plea agreements on
16 June 27, 2013, in the late afternoon. At that time, Mr. Miceli learned that Salisbury was being housed
17 in the medical psychiatric wing of the jail. During that visit, for the first time, Salisbury stated that
18 there were no charges against him, that he did not know who his counsel was or why counsel was
19 visiting him, and that Salisbury did not belong in custody. Salisbury claimed that he did not remember
20 ever going to court with counsel or ever meeting counsel.

21 In an Order (Dkt. #21) entered July 26, 2013, the court granted the motion for a psychiatric
22 examination pursuant to 18 U.S.C. §§ 4241, 4242, 4247, and Rule 12.2(c) of the Federal Rules of
23 Criminal Procedure. The order directed the United States Marshals Service to transport Mr. Salisbury
24 to a suitable Bureau of Prisons ("BOP") facility that conducts psychological evaluations closest to the
25 court to determine: (1) whether Salisbury was suffering from a mental disease or defect rendering him
26 mentally incompetent to the extent that he is unable to understand the nature and consequences of the
27 proceedings against him, or to assist properly in his defense; and (2) whether Salisbury suffered from a

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1 mental disease or defect rendering him mentally incompetent at the time of the commission of the
2 offense charged.

3 Salisbury was transferred to the Metropolitan Corrections Center (“MCC”) in San Diego,
4 California, and arrived at the facility on August 8, 2013, for purposes of the court-ordered psychological
5 evaluation. However, he was uncooperative with MCC staff and refused to participate in the
6 evaluation. Dr. Alicia Gilbert, Forensic Psychologist, attempted to engage Salisbury in an evaluation
7 on four separate occasions during his time at MCC. However, although Salisbury sometimes stated he
8 was willing to participate, he ultimately refused to cooperate on all four occasions. At the conclusion of
9 the evaluation period a Forensic Report (Dkt. #23) was prepared which was forwarded to the court,
10 filed under seal and provided to counsel for the government and counsel for Salisbury.

11 Salisbury was returned to this district and appeared at a status conference on October 8, 2013.
12 *See* Minutes of Proceedings (Dkt. #24). The court addressed Dr. Gilbert’s report that the forensic
13 evaluation could not properly be completed because Salisbury had failed to cooperate, and heard from
14 counsel concerning their proposals on how to proceed. The court gave counsel one week to file any
15 appropriate motions, and scheduled the matter for a competency hearing on October 24, 2013. *Id.*
16 Counsel for Salisbury filed the current Motion for Hearing to Determine Mental Competency to stand
17 trial (Dkt. #25) pursuant to Federal Rule of Criminal Procedure 27 [sic] and 18 U.S.C. § 4247(d).
18 Shortly after filing the motion, the parties filed a Stipulation (Dkt. #26) to continue the competency
19 hearing which the court granted. Order (Dkt. #27). The competency hearing was continued until
20 November 5, 2013. On October 24, 2013, counsel for Salisbury filed an ex parte motion for an order to
21 obtain medical records of the Defendant which the court granted in an Order (Dkt. #31) entered October
22 28, 2013. Counsel for Salisbury also requested appointment of a defense psychiatric expert to examine
23 Salisbury. The ex parte order to obtain medical records was necessary because Salisbury refused to sign
24 a medical authorization release to allow counsel and his expert to obtain the records. The parties
25 subsequently stipulated to continue the competency hearing and trial date on November 4, 2013 (Dkt.
26 #34) and November 27, 2013 (Dkt. #37).

27 The court set a status conference on December 3, 2013, after receiving the parties’ third
28 stipulation to continue the competency hearing. Counsel requested the continuance because counsel for

1 Salisbury was requesting that Dr. Norton Roitman be appointed to evaluate Salisbury and more time
2 was needed to get approval and authorization for Dr. Roitman to visit Salisbury at NSDC in Pahrump.
3 Additionally, Dr. Roitman needed time to review the medical records before testifying.

4 An evidentiary hearing on the motion to determine Salisbury's competency began January 2,
5 2014. Counsel for Salisbury called Dr. Sussman, the primary psychiatrist assigned to NSDC who
6 testified on direct and cross examination and answered the court's questions. Counsel for Salisbury
7 also called defense psychiatric expert, Dr. Norton Roitman, who testified on direct and cross
8 examination and answered questions from the court. The hearing was continued at the government's
9 request to call Dr. Alicia Gilbert as a witness on behalf of the government. Pursuant to the parties'
10 stipulation, Dr. Gilbert appeared at the continued February 6, 2014 competency hearing by video
11 conference. She testified on direct, cross examination, and also answered questions of the court.

12 DISCUSSION

13 **I. Applicable Legal Standards.**

14 The due process clause of the Fifth Amendment prohibits trying a defendant who is mentally
15 incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Pate v. Robinson*, 383 U.S. 375, 378
16 (1966). "A person whose mental condition is such that he lacks the capacity to understand the nature
17 and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense
18 may not be subjected to a trial." *Drope v. Missouri*, 490 U.S. 162, 171 (1975).

19 The treatment of offenders suffering from a mental disease or defect is governed by the Insanity
20 Defense Reform Act of 1984. 18 U.S.C. §§ 4241-48. The Federal Criminal Code establishes a multi-
21 part statutory scheme for addressing offenders suffering from a mental disease or defect who have
22 pending federal charges. If a question is raised concerning whether a defendant is competent to stand
23 trial or assist in his defense, the court first determines whether the defendant suffers from a mental
24 disease or defect rendering him mentally incompetent to the extent that he is unable to understand the
25 nature and consequences of the proceedings against him, or to assist properly in his defense. 18 U.S.C.
26 § 4241(a), and (d); *See also United States v. Friedman*, 366 F.3d 975, 980 (9th Cir. 2004). Section
27 4241(a) provides that whenever the court has reasonable cause to believe a defendant is suffering from
28 a mental disease or defect rendering him unable to understand the nature and consequences of the

1 proceedings against him or to assist properly in his defense, the court shall conduct a hearing to
2 determine the defendant's competency. Section 4241(d) establishes a two-part disjunctive test of
3 competency. *Id.* A defendant must be able both to understand the nature of the proceedings against
4 him, and to assist properly in his defense. *Id.*

5 Pursuant to 18 U.S.C. § 4241, the accused in a federal prosecution has the burden of proving
6 incompetence by a preponderance of the evidence. *Cooper v. Oklahoma*, 517 U.S. at 360. The
7 Supreme Court has held that presumption of competence does not offend any recognized principle of
8 fundamental fairness because such a procedural rule affects the outcome in a narrow class of cases
9 "where the evidence that a defendant is competent is just as strong as the evidence that he is
10 incompetent." *Medina v. California*, 505 U.S. 437, 449 (1992).

11 In *Dusky v. United States*, 362 U.S. 402 (1960) the Supreme Court held that the test for
12 determining whether a defendant is competent to stand trial is "whether he has sufficient present ability
13 to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a
14 rational as well as factual understanding of the proceedings against him." *See also Cooper v.*
15 *Oklahoma*, 517 U.S. 348, 356 (1996) (quoting *Dusky* and stating the test for incompetence is well
16 settled). The Ninth Circuit reviews a district court's determination of a defendant's competency to
17 stand trial for clear error. *United States v. Gastelum-Almeida*, 298 F. 3d 1167, 1171 (9th Cir. 2002).

18 **II. Findings and Conclusions.**

19 The court finds that Salisbury has not met his burden of establishing, by a preponderance of the
20 evidence, that he is incompetent to stand trial. More specifically, the court finds that Salisbury has not
21 shown that he lacks the present ability to consult with his lawyer with a reasonable degree of rational
22 understanding, or that he lacks a rational as well as factual understanding of the proceedings against
23 him. In reaching these findings, the court has relied on its own interactions with Salisbury in multiple
24 court hearings as well as the court's observations of Salisbury's behavior and demeanor, and the
25 pleadings and docket entries in Salisbury's other pending criminal case, 2:12-cr-00010-GMN-CWH.
26 The court has also relied on the forensic evaluation report prepared by Dr. Gilbert at MCC San Diego,
27 the report of defense psychiatric expert, Dr. Roitman, and the testimony of Dr. Gilbert, Dr. Roitman,

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1 and Dr. Sussman, at the January 2, 2014 and February 6, 2014 hearings. These findings are made for
2 the reasons explained more fully below.

3 None of the three testifying experts were willing to offer opinions to a reasonable degree of
4 medical certainty. With respect to Dr. Gilbert and Dr. Roitman, they were unwilling to provide
5 opinions to a reasonable degree of medical certainty because Salisbury refused to cooperate with their
6 evaluation. Dr. Sussman has been Salisbury's treating psychiatrist at NSDC where Salisbury has been
7 detained except while at MCC San Diego. Dr. Sussman testified he has been unable to definitively
8 diagnose Salisbury and treat him because of Salisbury's repeated failures to cooperate with him and
9 medical staff at NSDC. Dr. Sussman also testified that he and medical staff at NSDC believe Salisbury
10 is malingering for secondary gain, principally to obtain changes in where he is housed. Although
11 Salisbury has been placed on suicide watch on a number of occasions, neither Dr. Sussman, nor staff,
12 believe that Salisbury was actually suicidal or had made a bona fide suicide attempt. Salisbury was
13 placed on suicide watch because professional standards require this precaution when someone
14 expresses suicidal thoughts, even if medical staff believe the overall risk of suicide is low and/or no
15 genuine attempt at suicide occurred.

16 Dr. Gilbert prepared a comprehensive forensic evaluation report based on behavioral
17 observations, Salisbury's verbal communication with MCC's staff and review of MCC records during
18 the period of Salisbury's evaluation. While at MCC San Diego, Salisbury was uncooperative and
19 refused to participate in the evaluation. Dr. Gilbert attempted to engage Salisbury in the evaluation
20 process on four separate occasions. Salisbury was informed of the nature and purpose of the court
21 ordered evaluation, and stated he was aware of the evaluation. He agreed to participate in the process at
22 least twice, but then later refused.

23 When Salisbury initially arrived at MCC San Diego, he refused to answer most of the intake
24 questions, but reported a history of mental health treatment and past suicide attempts, most recently
25 four to six months prior. He was not on any prescribed medications at the time of transfer. Eight days
26 later on August 16, 2013, he was seen for a routine physical examination and was described as
27 cooperative, but denied previous mental health treatment and suicide attempts. On August 26, 2013, he
28 was screened for depression because while seeing the dentist he was difficult to interview, refused to

1 answer some of the questions about his health and family health, and told the dentist “I know the
2 answer to that question, but I do not like all of these questions.” He was described as tearful.

3 Psychology staff at MCC San Diego saw Salisbury approximately twelve different times outside
4 the evaluation process. He was behaving bizarrely when he was initially seen August 9, 2013 hiding
5 under the bench in a holding tank and refusing to submit to a medical exam. Salisbury stated he had
6 concerns about being housed in general population and claimed he experienced blackouts where he lost
7 time and knowledge of his actions.¹ He told the psychologist he had a history of mental health
8 treatment for “autophobia” which he said was a fear of not knowing what he may do and memory loss.
9 He reported recent suicide attempts by cutting his wrist and hanging six months prior, but denied
10 suicidal ideation at the time of interview. The psychologist described him as alert, oriented, cooperative
11 with adequate grooming and hygiene, appropriate eye contact, clear speech, goal-directed thinking,
12 euthymic mood, and appropriate range of affect. He was placed in the Mental Health Unit (“MHU”) as
13 a precaution because of his strange behavior.

14 On August 13, 2013, he was seen by a staff psychologist and asked to be transferred to a general
15 population housing unit. He claimed that he did not remember hiding under the bench and stated he
16 had dementia and autophobia which was associated with memory loss. The psychologist felt it was
17 highly unlikely given his age that he had dementia, especially because Salisbury claimed he had been
18 diagnosed years prior. Salisbury was alert, oriented, cooperative with a stable mood and congruent
19 affect. Salisbury denied suicidal ideation or auditory and visual hallucinations and no delusional beliefs
20 were noted. The following day Salisbury was again seen by the staff psychologist who attempted to
21 interview him. Salisbury stared at the wall and ignored requests to come to the door to talk with the
22 psychologist. The psychologist returned later in the day and Salisbury asked her why she had not seen
23 him earlier. He claimed not to remember her earlier visit.

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25 ¹Dr. Gilbert’s forensic evaluation report states that Salisbury stated on August 9, 2013, he had no
26 concerns about being housed in general population. However, this is an apparent typographical error.
27 The BOP record of Salisbury’s suicide risk assessment on August 9, 2013 indicates that Salisbury
28 expressed concerns about being housed in general population due to his tendency to “go in and out.”
The assessment conducted by the psychologist concluded that no suicide attempt had occurred, that
Salisbury’s overall suicide risk was low, and that a formal suicide watch was not warranted.

1 On August 19, 2013, a staff psychologist saw Salisbury after he threatened suicide when officers
2 attempted to transfer him to the Special Housing Unit ("SHU") because he had been stealing food
3 items, engaging in disruptive behavior, and walking around naked after taking a shower. When he
4 arrived at the SHU and was told he would be sharing a cell with another inmate, he told the officer he
5 was suicidal. However, when the psychologist asked him about it, he claimed he did not remember
6 making this statement and insisted he was not suicidal. He was transferred back to the MHU for further
7 observation, but not placed on suicide watch.

8 On August 20, 2013, he was seen by an MHU psychologist and said he refused to "team up with
9 someone", *i.e.*, share a cell. When told he might be required to share a cell with another inmate based
10 on space needs at the facility, he stated "well then I'll just be suicidal til the day I die." The
11 psychologist opined that Salisbury's suicidal threats were manipulative and an attempt to secure
12 preferred housing.

13 During his stay at MCC San Diego, Salisbury made numerous statements and engaged in
14 conduct on multiple occasions designed to have his housing situation changed. At times he demanded
15 to be returned to general population and at other times wanted to remain in the MHU. Attempts were
16 made to transfer him to the SHU for various incidents of misconduct. For example, on September 8,
17 2013, Salisbury threw his mug at the window of the cell door which cracked and a piece of glass hit the
18 unit officer. The officer reported Salisbury was angry because he was housed on the intake housing unit
19 and not allowed to take a shower immediately after asking the officer. He was escorted to the SHU,
20 demanded a single cell, and threatened suicide when told he would not be housed alone. Salisbury later
21 admitted to the lieutenant that he threatened suicide to get a single cell. On September 9, 2013, he
22 again stated he would "stay suicidal" to avoid being housed with another inmate.

23 Dr. Gilbert and staff diagnosed Salisbury with antisocial personality disorder based on staff
24 observations and Salisbury's conduct. He repeatedly failed to follow facility rules, stole food and
25 commissary items from other inmates, entered restricted areas after repeatedly being told they were off
26 limits, was at times cooperative and then uncooperative, and repeatedly threatened suicide to avoid
27 being housed with another inmate, or to obtain preferential housing.

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1 Although Salisbury claimed to have memory problems and “autophobia”, in contacts with
2 psychology staff Salisbury displayed intact memory and was able to recall the names of his previous
3 and current defense attorneys. He asked appropriate questions about the evaluation, demonstrated goal-
4 directed thinking with no evidence of disorganized speech or thought disorder, denied visual and
5 auditory hallucinations, and was not observed to respond to any internal stimuli. He did not exhibit any
6 delusional beliefs other than stating his belief that there were no charges pending against him. Dr.
7 Gilbert and staff did not consider this delusional thinking because his reported belief was specific to his
8 pending cases, there were no other reported or observed delusional beliefs, and no evidence to suggest
9 he was suffering from a psychotic disorder.

10 Dr. Gilbert concluded that Salisbury’s behavior was calculated and intended for secondary gain
11 and that he seemed motivated to avoid all consequences associated with his behavior at the MCC as
12 well as the consequences associated with his charges. She did not diagnose malingering because she
13 was unable to reach that diagnosis with a reasonable degree of medical certainty because of Salisbury’s
14 refusal to participate in the evaluation process which includes objective tests which measure
15 malingering. Overall, Dr. Gilbert reported Salisbury was arrogant and demanding and gave no
16 consideration to others’ personal space or property. He claimed he was not responsible for his conduct
17 because of his autophobia. Although Salisbury at times exhibited odd and bizarre behavior, Dr. Gilbert
18 opined that Salisbury’s presentation of mental health symptoms and memory loss was contrived and
19 inconsistent with any known mental illness or cognitive disorder. Dr. Gilbert testified that she was
20 unable to diagnose malingering with a reasonable degree of medical certainty. However, she also
21 testified that in her opinion, it is more likely than not that Salisbury is malingering, *i.e.*, feigning or
22 exaggerating symptoms of mental illness and memory loss to avoid the consequences of his actions
23 both at MCC and of his pending criminal charges.

24 Dr. Gilbert was also unable to opine to a reasonable degree of medical certainty that Salisbury
25 was able to understand the nature and consequences of the court proceedings against him or to assist
26 properly in his own defense. However, Dr. Gilbert testified that in her opinion it was more likely than
27 not that Salisbury was both able to understand the nature and consequences of the proceedings against
28 him, and to assist in his own defense.

1 Defense psychiatrist Dr. Roitman prepared a report and also testified. Dr. Roitman opined that
2 Dr. Gilbert fairly reported observations, discussions and interactions with Salisbury and was transparent
3 in her qualifications of her findings of suspected malingering, and antisocial personality disorder. Dr.
4 Roitman had no criticism of Dr. Gilbert's work and "careful arguments supporting her findings."

5 Dr. Roitman reviewed the medical records and attempted to interview Salisbury at NSDC.
6 Salisbury refused to come out of his cell for the interview. Dr. Roitman briefly saw Salisbury in his
7 cell. Salisbury stated he was not charged with anything and refused to answer any of Dr. Roitman's
8 questions.

9 In his report, and testimony, Dr. Roitman advanced a diagnostic theory which he acknowledged
10 was speculative based on his examination of the medical records. He concluded that there was ample
11 psychiatric evidence from the records to support a diagnosis of paranoid delusional disorder. Dr.
12 Roitman's diagnostic theory is that Salisbury's paranoia interferes with his ability to process the legal
13 system. Dr. Roitman's theory is that Salisbury does not trust anyone and believes that if he refuses to
14 cooperate with staff, other inmates, judges and attorneys, he will avoid the worst and remain in control.
15 Protest and disruption are the only ways for him to fight his adversaries and refusal, denial, resistance
16 and opposition help him define himself and reinforce his sense of autonomy.

17 In addressing repeated medical references to Salisbury malingering, Dr. Roitman opined that it
18 was not clear what goal Salisbury was seeking, that is, what secondary gain he hoped to achieve.
19 Malingering is motivated by the hope of gaining something from behavior, such as feigning injury for a
20 financial award. Salisbury's observed antisocial behaviors do not get him released early, or get him
21 privileges, profit or sympathy. Therefore, according to Dr. Roitman's diagnostic theory, Salisbury's
22 choices and behaviors make sense if Salisbury believes no one can be trusted. Salisbury's non-
23 compliance and disruption are ways for him to preserve himself.

24 The court found the testimony of Dr. Sussman and Dr. Gilbert persuasive, and consistent with
25 the court's own interactions with and observations of Salisbury. Dr. Sussman, Dr. Gilbert, medical and
26 non-medical staff at both NSDC and MCC believe Salisbury is malingering. Both Dr. Gilbert and Dr.
27 Sussman testified that Salisbury's reported suicidal attempts were superficial and not genuine. Both
28 doctors and their staff believe Salisbury's reports of suicidal ideation and transparently superficial

1 behavior suggesting suicide attempts were motivated by his desire to receive preferential housing at
2 NSDC and MCC. Dr. Gilbert was not willing to offer an opinion to a reasonable degree of medical
3 certainty, but was willing to offer an opinion by a preponderance of the evidence that Salisbury was
4 malingering. She also testified that Salisbury was, more likely than not, competent to stand trial and to
5 assist his counsel. Dr. Roitman's elaborate diagnostic theory is based on his review of the medical
6 records, and his brief interview with Salisbury. Dr. Roitman conceded his theory was speculative.

7 The court has also relied on its own interactions and observations of Salisbury in multiple court
8 hearings in reaching its findings that Salisbury is both able to understand the nature and consequences
9 of the proceedings against him, and to assist his counsel in his defense. Salisbury appeared for an initial
10 appearance and arraignment and plea in both of his cases, acknowledged receipt of the charging
11 documents, and an understanding of the charges against him. Salisbury was brought over on a writ of
12 habeas corpus ad prosequendum to make an initial appearance on his felon in possession charge in Case
13 No. 2:12-cr-00010 on January 27, 2012. The office of the Federal Public Defender was appointed and
14 represented Salisbury until being relieved as counsel at a hearing conducted by the district judge on
15 November 19, 2012.

16 Between the time of his initial appearance and requesting replacement counsel, counsel for
17 Salisbury filed a notice of intent to plead guilty and memorandum in support of guilty plea June 20,
18 2012, which the district judge set for change of plea hearing. *See* Notice of Intent to Plead Guilty (Dkt.
19 #22 & Memorandum Dkt #23), and Notice of Hearing (Dkt. #24). At the July 3, 2012 change of plea
20 hearing, counsel advised the court that Mr. Salisbury had changed his mind and wanted to proceed with
21 trial. *Id.* The court reset the matter for trial, and the parties stipulated to at least two subsequent
22 continuances of the trial date. On November 5, 2012, the district judge again received a plea
23 memorandum which resulted in setting the matter for a change of plea hearing. *See* Minute Order in
24 Chambers (Dkt. #32). At the November 19, 2012 change of plea hearing, the district judge conducted
25 an ex parte hearing on the Defendant's request to replace the Federal Public Defender as counsel of
26 record. The court granted the request, and the Federal Public Defender's Office filed a stipulation to
27 continue the trial date for the fifth time based on Salisbury's request for substitute counsel. *See*

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1 Stipulation (Dkt. #33). Current counsel, Mr. Miceli, was appointed November 27, 2012, in the first
2 filed action, and was subsequently appointed when this case was filed.

3 Mr. Salisbury and Mr. Miceli engaged in multiple meaningful conversations about his cases, and
4 discussed resolution by plea agreement. Mr. Miceli has reported to the court orally on the record and in
5 writing that Mr. Salisbury met and conferred with him to discuss his cases many times over the course
6 of his representation. Mr. Miceli discussed verbal plea negotiations he had engaged in with government
7 counsel with his client. Mr. Salisbury told Mr. Miceli he was willing to accept the government's offer
8 which resulted in Mr. Miceli communicating with government counsel and preparation of written plea
9 agreements. Mr. Miceli had no question about Mr. Salisbury's competency to stand trial or assist him
10 until the June 27, 2013 visit at the Pahrump facility to go over the written plea agreements. Counsel for
11 both sides advised the court that the written plea agreements contained preliminary sentencing guideline
12 calculations indicating Salisbury was likely to receive a substantial prison sentence. The June 27, 2013
13 visit was the first time Salisbury started making statements that there were no pending federal charges
14 or claimed that he did not know who counsel was or why he was incarcerated.

15 Salisbury has been disruptive on multiple occasions before and during court proceedings. On
16 one occasion, after return from MCC San Diego, he put his head down on the table, refused to look up,
17 and made snoring noises. However, he stopped making snoring noises and listened intently when the
18 court discussed with counsel the legal standard, burden of proof, and consequences of a finding of
19 incompetency. When Salisbury appeared to recognize that the court was observing him, he reverted to
20 transparently feigning not to understand where he was or who was addressing him. On a subsequent
21 court appearance, the court directly addressed Salisbury and urged him to cooperate with his counsel
22 Mr. Miceli and Mr. Miceli's partner, Mr. Pitaro, who was present in court. The court advised Salisbury
23 that both were highly skilled, experienced CJA counsel who had his best interests in mind. When the
24 court began discussing with counsel the fact that a finding of incompetency to stand trial would not
25 dispose of the charges against him, Salisbury spontaneously responded that the doctor had told him he
26 could not stand trial if he was incompetent. The court inquired what doctor had told him that.

27 Salisbury's body language and facial expressions quite obviously conveyed that he recognized that he
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1 volunteered too much information, and had responded too cogently. Salisbury immediately reverted to
2 chanting his mantra that there were no charges against him.

3 At the January 2, 2014 hearing, Salisbury was disruptive. He interrupted the court, and
4 attempted on several occasions to interrupt the witnesses while testifying. However, when the court
5 explained that his disruptive behavior would not be tolerated, and that he would be removed from the
6 courtroom if he continued to interrupt, he ceased and listened to the proceedings. He did need to be
7 reminded more than once. The court advised him that he had the right to be present in the courtroom,
8 and that the court would prefer that he remain, but that he would be removed and other arrangements
9 would be made for him to listen to the proceedings if he continued his behavior. He clearly understood
10 what the court was saying and conformed his behavior to avoid being removed.

11 At the January hearing, the court questioned Dr. Roitman about Salisbury's comment to the
12 court that he understood he could not be tried if he was found incompetent. After the testimony, the
13 court addressed Mr. Salisbury and asked if there was something he would like to say because of his
14 earlier attempts to interrupt the testimony. Among other things, Salisbury stated that he believed the
15 court had misquoted his prior statement to the court (that a doctor had told him he could not stand trial
16 if he was incompetent) in questioning Dr. Roitman. He quite obviously recognized that his earlier
17 statement to the court was being considered as evidence that he understood more than he was claiming.

18 Salisbury was extremely disruptive prior to the February 4, 2014 hearing. He was brought into
19 the courtroom by the U.S. Marshals Service fifteen minutes before the scheduled 9:00 a.m. hearing.
20 The court was able to hear Salisbury over the court's audio equipment in chambers. He yelled at the
21 Marshals, claimed his restraints were too tight, and was returned to the holding cell where the Marshals
22 readjusted his restraints. He was returned to the courtroom and yelled at multiple U.S. Marshals present
23 to maintain order. Forty to fifty times in rapid succession in staccato fashion, he yelled at the Marshals
24 "get your hands off me, get your hands off me, get your hands off me, etc." interspersed with "get your
25 f***ing hands off me." When Salisbury continued this behavior, the court instructed the courtroom
26 deputy to make arrangements with the Marshals to make sure that the proceedings could be heard from
27 the holding cell adjacent to the courtroom over the court's sound equipment. The Marshals again
28 removed Salisbury to the holding cell for this purpose. As soon as Salisbury learned that he would

1 remain in the holding cell rather than the courtroom if he continued to be disruptive, he ceased being
2 disruptive.

3 The court took the bench, Salisbury was returned to the courtroom, the court made a record on
4 what the court had heard in chambers from the audio feed from the courtroom and addressed Salisbury.
5 The court again told Salisbury that he had the right to be present and that the court would prefer that he
6 remain in the courtroom for the hearing. However, Salisbury was advised that if he became disruptive,
7 he would be removed and would have the opportunity to listen to the proceedings from the holding cell.
8 Salisbury remained compliant and listened to the testimony.

9 At the conclusion of the testimony the court addressed counsel to determine whether either side
10 had any additional evidence or testimony to adduce. Neither side had anything further to offer. The
11 court addressed Mr. Salisbury and asked whether he would like an opportunity to confer with his
12 counsel before concluding the hearing. Mr. Salisbury responded "sure". Arrangements were made to
13 return Salisbury to the Marshal's lockup so that Mr. Miceli could confer with him. The court told Mr.
14 Miceli and Mr. Salisbury to take as much time as they needed to confer, and that the court would recess
15 until Mr. Miceli indicated they were ready to proceed. A recess was taken until Mr. Miceli indicated he
16 and his client were ready to proceed. Mr. Miceli advised the court that he had been able to confer with
17 Mr. Salisbury during the recess and had discussed the proceedings with him and that the defense had
18 nothing further to offer. The court asked whether Mr. Miceli had discussed with Mr. Salisbury his right
19 to either testify or not. Mr. Miceli answered affirmatively, but Mr. Salisbury denied the conversation
20 occurred. The court therefore directly addressed Mr. Salisbury and advised him that he had the right to
21 testify, but could not be compelled to testify, and asked whether he wished to testify. Mr. Salisbury did
22 not respond. The court then asked whether Mr. Salisbury had anything to say before the court
23 adjourned. Mr. Salisbury uttered the single sentence "there are no charges against me." The court
24 asked whether he had anything else to say and Mr. Salisbury did not.

25 The court concludes that Salisbury is feigning an inability to understand the nature of the
26 proceedings against him, and is deliberately refusing to cooperate with his defense counsel. The court
27 concludes that Salisbury is perfectly capable of assisting counsel in his own defense. He worked with
28 counsel for many months after the initial charges were brought against him. He was represented by the

1 office of the Federal Public Defender in the felon in possession charge from January 27, 2012, until he
2 asked for substitute counsel at a hearing on November 19, 2012. He requested substitute counsel in the
3 related case after twice causing counsel to file a notice of intent to plead guilty and plea memoranda
4 which he subsequently repudiated, requested leave with withdraw, and that the matter proceed to trial.
5 He has been represented by Mr. Miceli since the Office of the Federal Public Defender was granted
6 leave to withdraw in his other case. Nothing in the record in the felon in possession case suggests that
7 prior counsel had any reason to suspect Salisbury was incompetent.

8 Salisbury only began refusing to cooperate with Mr. Miceli and verbalizing a belief that there
9 were no charges pending against him shortly before the scheduled trial date in this case, and only after
10 Salisbury had agreed to accept a negotiated resolution of his charges for the third time. Counsel for
11 both sides advised the court that the plea agreements contained preliminary sentencing guideline
12 calculations indicating Salisbury was likely to receive a lengthy prison sentence. Salisbury began
13 engaging in increasingly bizarre behavior, refusing to cooperate with counsel, and claiming an inability
14 to understand at the June 17, 2013 visit with counsel to go over the written plea agreements, supporting
15 Dr. Gilbert's opinion and the court's finding that Salisbury is malingering to avoid the consequences of
16 his pending criminal charges.

17 Salisbury may very well suffer from some form of mental illness. The court lacks the expertise
18 to make this judgment. However, as Dr. Gilbert testified, people with mental illnesses can still be
19 competent to stand trial and to assist in their defense. Dr. Gilbert and her staff concurred in the
20 diagnoses of antisocial personality disorder. The court found Dr. Gilbert persuasive that a person with
21 antisocial personality disorder is nevertheless competent to stand trial and assist in his defense. The
22 weight of the evidence does not support Dr. Roitman's diagnostic theory, which he acknowledges is
23 speculative, that Salisbury suffers from paranoid delusional disorder which prevents him from
24 cooperating with his counsel, and processing the consequences of the legal proceedings against him.


25 Dr. Gilbert did not review Dr. Roitman's report or testimony. The court asked her whether she
26 had an opinion whether Salisbury's presentation while at MCC was consistent or inconsistent with a
27 diagnosis of paranoid delusional disorder. Dr. Gilbert testified that Salisbury's presentation was not
28 consistent with a diagnosis of paranoid delusional disorder or any other known mental illness or

1 cognitive disorder. Dr. Gilbert testified that Salisbury did not display symptoms of paranoid delusional
2 disorder. Specifically, Dr. Gilbert testified that Salisbury displayed organized thought and goal-
3 oriented thinking. She explained that person a suffering from paranoid delusional disorder would be
4 incapable of organized, goal oriented thought. Salisbury also did not display other delusional behavior
5 while at MCC San Diego such as claiming auditory or visual hallucinations and did not display
6 behavior indicating response to internal stimuli. The court found Dr. Gilbert's testimony convincing
7 that Salisbury's repeated statements that there were no charges against him is not true delusional
8 thinking because his only delusional expressions are related to his legal cases.

9 Similarly, Dr. Sussman testified that although there are some references in the NSDC medical
10 records that could be construed as delusional thinking, such a stating he was refusing to take medication
11 because he feared it was adulterated and that he heard voices, neither Dr. Sussman, nor medical staff at
12 NSDC believe these were genuine delusions. Rather, Dr. Sussman and his staff concluded that
13 Salisbury was engaged in deceitful conduct for secondary gain.

14 The weight of the evidence before the court is consistent with Dr. Gilbert's conclusion that
15 Salisbury's behavior is calculated and intended to avoid the consequences of his behavior and his
16 pending federal criminal charges. The testimony and medical records the witnesses have relied upon
17 and testified about, support a finding that Salisbury has engaged in a pervasive pattern of failure to
18 conform to social norms, disregard for others and deceitfulness. The court also found the testimony of
19 Dr. Sussman and Dr. Gilbert persuasive that Salisbury has not made genuine attempts at suicide, and
20 has expressed suicidal ideation for secondary gain, *i.e.*, to get something he wants or to avoid something
21 that he does not want. While at MCC San Diego, Salisbury repeatedly claimed he was suicidal, then
22 denied he was suicidal, and then frankly admitted that he would "stay suicidal" or "just be suicidal til
23 the day I die" to avoid being housed with another inmate.

24 For all of the foregoing reasons, the court concludes that Salisbury has not met his burden
25 pursuant to 18 U.S.C. § 4241 of proving he is unable to understand the nature and consequences of the
26 proceedings against him, or to assist properly in his defense by a preponderance of the evidence.
27 Rather, the court finds that Salisbury is, and has been, feigning an inability to understand and
28 deliberately and voluntarily choosing not to cooperate with his counsel. Accordingly,


Peggy A. Leen
United States Magistrate Judge